IN THE

Supreme Court of the United States

October Term, 1946.

No. 74

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

vs.

H. A. ROSSON, OIL WELL CEMENTING COMPANY, a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF RESPONDENT.

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HALLIBURTON OIL WELL CEMENTING COMPANY, a corporation,

Respondent.

BRIEF OF RESPONDENT.

Opinions Below.

The opinion of the District Court [R. 24-29] is reported at 57 F. Supp. 408. The majority and dissenting opinions of the Circuit Court of Appeals [R. 480-483] are reported at 153 F. (2d) 622.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on December 29, 1945 [R. 484]. The petition for a writ of certiorari was filed on March 29, 1946, and granted on May 13, 1946. The jurisdiction of this Court is based upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Respondent and each subject employee negotiated and executed a written employment contract, of which the following is typical:

> "Employer agrees to employ Employee as a cementer and to pay Employee for his services a regular basic rate of 59 cents per hour for the first (40) hours of any workweek, and not less than one and one-half times such basic hourly rate of pay for all time over (40) hours in any workweek, with a guarantee that Employee shall receive for regular time and for such overtime as the necessities of the business may demand a sum not less than $63.46 for each workweek." [R. 33, 481.]

Each employee during the period involved was compensated in accordance with the terms of the employment contract.

By a pre-trial stipulation [R. 67] and order [R. 23], the issue for trial was limited to the following question, which is the issue here:

> "During the period here involved did defendant's field employees receive compensation for their hours of work in excess of forty hours in a week at rates not less than one and one-half times the regular rates at which they were employed."

The question is determined by whether or not the contract hourly rate is the "regular rate" upon which overtime compensation is to be computed.

Statute Involved.

The pertinent provisions of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S .C., sec. 201) are as follows:

"Sec. 7(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * * * * *

(3) for a workweek longer than forty hours after the expiration of the second year from * * * (the effective) date (of this section), unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed."

Statement.

Respondent has its main place of business at Duncan, Oklahoma, and is engaged in the manufacture and sale of oil well supplies [R. 12] and in the business of oil well servicing in the oil producing states, including California. It owns special tools and equipment for various types of oil well cementing and for testing and surveying oil wells and rents such tools and equipment to persons engaged in drilling or operating oil wells and furnishes skilled employees to operate the same [R. 62-63].

There are approximately 2100 employees of respondent corporation [R. 329]. Prior to the enactment of the Fair Labor Standards Act of 1938, respondent's shop em-

ployees were paid on an hourly rate basis while its office employees and field employees were paid on a monthly salary basis [R. 13]. Soon after the effective date of the Act respondent limited the number of hours per week for its office and shop employees to the maximum number of hours prescribed by the Act [R. 13]. The salaries of field employees were adjusted to an hourly rate of pay with compensation for overtime hours at not less than one and one-half times the regular hourly rate, with a weekly guaranty similar to the plan here under consideration [R. 14]. Prior to March 1942, representatives of the Wage and Hour Division of the Department of Labor objected to the guaranty feature of the plan of compensation of field employees, notwithstanding the decision of the Circuit Court of Appeals for the Fifth Circuit in the *Belo* case [R. 15 and 17]. In order to avoid litigation and for the purpose of complying with the Act as interpreted by the Administrator, and, effective March 1, 1942, respondent adopted for the field employees the Irregular Workweek Plan set forth in Section 12 of Interpretative Bulletin No. 4 [R. 17]. Under this plan the salary was less than the amount of the guaranty under the previous contract plan [R. 316]. After the decision of this Court in the *Belo* case, and effective July 1, 1942, respondent negotiated and entered into written employment contracts with each of the field employees working a fluctuating number of hours per week. The amount of the weekly guaranty of certain employees was increased to the amount that had been guaranteed prior to the adoption of the Irregular Workweek Plan [R. 316]. There were approximately 900 field employees who executed the written employment contracts [R. 329].

This action was confined to employees employed in California and carried on respondent's "contract" payroll subsequent to July 1, 1942 [R. 21, 63]. In March 1944 there were 66 such employees in California. Such employees consist of cementers, testers, electric survey operators, drivers and field mechanics [R. 63]. The work of these employees is not at a fixed establishment but at the oil wells in the field. These employees operate from camps located 35 or more miles from the scene of their work [R. 424]. Respondent has no control over the volume of work nor the time when it must be done. The oil well must be cemented, tested or surveyed at the time specified by the well owner or operator. The volume of work is not uniform but fluctuates widely from week to week [R. 306-309; 226], being influenced by the fluctuating oil well drilling activity in the locality. The employees who perform the services and operate the tools are trained men and additional skilled men are not obtainable in busy periods. In slack periods these men are retained on the payroll as otherwise they would be unavailable when needed. The hours worked by the employees fluctuate widely from week to week. Several consecutive days may pass when an employee has no work to do [R. 309] and the total hours worked by him during the week may be few or none. In other weeks the hours shown on the payroll records as hours worked may exceed 100. There was no normal or regular number of hours worked in a workweek. The wide variation in the number of hours worked per week by the field employees is illustrated by Defendant's Exhibit "J" [R. 366-367; 365], Plaintiff's Exhibit No. 3 [R. 160, *et seq.*], and No. 3A [R. 181]; and Exhibit No. 5 [R. 226].

Long hours are shown on the payroll records for some weeks for some employees. This does not mean that the employees worked for the stated number of hours in the usually accepted meaning of that term. Many of the hours recorded as hours worked were spent by the employee waiting or resting or following his own pursuits. Such idle time includes waiting on the well location (2 to 16 hours) while the drilling crew runs the casing, waiting (6 to 8 hours) while the cement is setting, waiting while perforation work is done by another company and waiting (for 24 hours or more) while the testing tool is in the well hole [R. 429]. The employee may spend such waiting time in resting or even engaging in recreational pursuits at a nearby town, provided he leaves word where he can be reached by the well owner or operator. Such waiting time is recorded on the payroll records as hours worked [R. 291-293; 425-426; 428-433; 449-452]. As shown by Defendant's Exhibit "H" [R. 354], in sample periods 6,298 hours were spent by the employees waiting on location as compared with 11,142 hours spent in running of the job. This comparison is more significant than appears on its face since the hours designated as running the job include the waiting time on location after the job has been commenced [R. 430; 438]. Other idle time recorded as hours worked is time spent at the camp or base when there is nothing to do [R. 295, 436, 452].

In July 1942, respondent and each of the field employees executed a written employment contract in letter form [R. 63], a typical example of which is found in the record at page 547. In the following month respondent and each field employee negotiated and executed a formal writ-

ten employment contract [R. 64], a typical example of the pertinent provisions of which is as follows:

> "Now, Therefore, the Employer and Employee mutually covenant and agree as follows:
>
> "Employer agrees to employ Employee as a cementer and to pay Employee for his services a regular basic rate of 59 cents per hour for the first (40) hours of any workweek, and not less than one and one-half times such basic hourly rate of pay for all time over (40 hours in any workweek, with a guarantee that Employee shall receive for regular time and for such overtime as the necessities of the business may demand a sum not less than $63.46 for each workweek." [R. 33, 481.]

Pursuant to the provisions of the employment contract [R. 464] increases in the hourly rate of pay and in the minimum guaranty were made by written notice, of which the following is typical:

> "Since the date of your Employment Contract, signed October 16, 1942 the provisions relating to compensation have been changed as follows:
>
> "The regular basic rate per hour has been increased from 54 cents to 59 cents. The sum guaranteed for each workweek has been increased from $57.69 to 63.46.
>
> "The guaranteed weekly minimum of $63.46 is equivalent to a monthly salary of $275." [R. 467, 447, 121.]

All of the agreed basic hourly rates were equal to or were in excess of the minimum compensation required by Section 6 of the Act or order of the Administrator. The weekly guaranty ranged from $42.69 to $65.77, which was equivalent to a monthly guaranty ranging from $185 to

$285 [R. 377-378]. The weekly guaranty paid for the first 40 hours in a workweek at the basic hourly rate specified in the contract and an additional 44 hours at a rate of at least one and one-half times the specified regular hourly rate [R. 80]. While in some instances the weekly guaranty did not exceed the equivalent of the monthly salaries previously paid, others did exceed such amounts. Some drivers previously received under the irregular workweek plan a monthly salary of $155 but the employment contracts provided for a weekly guaranty equivalent to a monthly guaranty of $165 [R. 315]. The weekly guaranty of field mechanics was approximately 9% greater than the salaries previously paid under the irregular workweek plan [R. 316]. Respondent could not have afforded to pay the amount of the weekly guaranty as a weekly salary compensating for straight time only [R. 470].

During the entire period involved the field employees were compensated in accordance with the respective employment contracts [R. 35]. For all hours worked in a workweek each employee received a sum not less than the specified basic hourly rate for the first 40 hours and for all hours in excess of 40 at a rate at least one and one-half times such specified basic hourly rate.[1] In all instances where an employee worked more hours in a workweek than were paid for by the weekly guaranty he was paid a sum in addition to the weekly guaranty. All hours worked in excess of those paid for by the guar-

[1] In three instances where less than a full week was worked the employee received slightly less than his proper compensation. This was due to an unintentional and inadvertent error in calculation [R. 339] and the Court so found [R. 36]. Hereafter these exceptions will be ignored.

anty were compensated at a rate of one and one-half times the basic hourly rate specified in the contract [R. 333, 148, 35]. The statements in the Administrator's brief (p. 5) that "the field employees continued to receive monthly salaries in substantially the same manner as before" and that "the hourly rate specified in the contract was never used" are contrary to the record.

At the time the employment contracts were negotiated and at all times since respondent had first come into existence, all employees had been paid semi-monthly. It was considered advantageous both to respondent and to its employees to continue to pay the field employees semi-monthly notwithstanding that the written employment contracts provided for a weekly guaranty. The respondent's financial records and statements were based on a calendar month, calendar quarter or calendar year. Deductions for group insurance and orders for grocery bills and installment payments were on a monthly or semi-monthly basis [R. 330]. Therefore, respondent, until January 1944, continued to pay the field employees semi-monthly.[2]

The payroll records were made up in the various field offices and in very few instances were there trained accountants to prepare the payroll records. Respondent endeavored to devise a simple system and to eliminate computations as much as possible. The weekly guaranty was translated into an equivalent monthly guaranty by multiplying the amount by fifty-two and dividing by twelve

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[2] The Administrator expressly has declared that the pay period need not coincide with the workweek and that there is no objection if the pay period is semi-monthly. Interpretative Bulletin No. 4, Par. 29 [R. 240].

[R. 78].[3] To aid the clerical force in making up the payroll records respondent sent to its field offices a chart [R. 73] which listed the hourly rate specified in the contract for the first forty hours in a workweek, the overtime hourly rate, the weekly guaranty and the monthly equivalent to the weekly guaranty. In some instances the overtime hourly rate shown on the chart was slightly more than one and one-half times the basic regular hourly rate. This was due to the fact that for a ready computation the monthly equivalent of the weekly guaranty was shown in round figures and in some instances paid for overtime hours at a rate slightly in excess of one and one-half times the straight-time hourly rate. The chart was merely for the convenience of the clerical force and was no part of the employment contract. All hours worked by each employee in a workweek were shown on the semi-monthly payroll reports. No space was provided for showing separately the number of hours worked in excess of 40 unless the total hours worked exceeded 84. Since the weekly guaranty paid for the first 40 hours worked at the regular rate and for an additional 44 hours at a rate of one and one-half times the regular rate and since under the employment contract respondent was obligated to pay at least the amount of the weekly guaranty, no computation was required unless the hours worked in a workweek exceeded 84. The number of overtime hours worked in a workweek was readily ascertainable by subtracting 40 from the total hours worked. The forms of payroll reports and the instructions show

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[3]This method of computation is on the principle advocated by the Administrator for the irregular workweek plan. Interpretative Bulletin No. 4, Par. 10 [R. 235, 376].

an attempt to attain simplification and to save clerical work. The instructions are indubitably clear that all field employees would receive the amount of the weekly guaranty or the amount computed on the contract hourly rate, whichever was the greater [R. 78, 120]. By pre-trial stipulation [R. 66] and order thereon [R. 23], all charges relating to record-keeping were eliminated from the case. When respondent learned that the Wage and Hour Division desired that additional information be shown on the payroll records, respondent on January 15, 1944, adopted a bi-weekly payroll period [R. 386] and since that time the field employees have received their compensation bi-weekly [R. 64, 330].

There was shown on the bi-weekly payroll form the regular hourly rate, the overtime rate, the regular hours worked, the overtime hours worked, the regular rate earnings, the overtime rate earnings and where less than 84 hours were worked, as a further "break down," the difference between the amount of the weekly guaranty and the amount computed on an hourly basis. This was done, however, merely because respondent understood that the attorney for the Wage and Hour Division desired the payroll report to show a complete detailed statement [R. 386].

By the provisions of the employment agreement respondent was obligated to pay the amount of the weekly guaranty, irrespective of the number of hours worked. Respondent performed this obligation and paid at least this sum for every full workweek whether the number of hours worked was more or less than 40. During the period here involved, in only 14% of the total man workweeks did employees fail to work more than 40 hours in the workweek [R. 381].

In a few instances [R. 335] an employee did not work a full workweek. This was occasioned by the employment terminating or commencing during the pay period [R. 336] or by reason of a transfer to another Division. Such terminations were largely due to the employee entering the armed services [R. 469]. In such instances respondent compensated the employee for the partial workweek at the hourly rate or a *pro rata* amount of the weekly guaranty, whichever was the greater [R. 185-186, 341-350, 351, 379, 380] as it believed it was obligated to do [R. 380].

The employees here involved received annual vacations at full pay [R. 385, 31] and received full pay during periods of illness [R. 298-299, 452, 31] and were permitted absences to attend to personal affairs without deduction from pay [R. 299, 31]. Group insurance was available [R. 384, 32]. Except for entering the armed services the employee turnover was very small [R. 469].

The District Court, the Honorable J. F. T. O'Connor, presiding, among other things, expressly found:

> "Each of said contracts was actually a *bona fide* contract of employment and was intended to and did really fix the regular rate at which each of the respective field employees was employed. Defendant agreed to employ and did employ, and each field employee agreed to be employed and was employed, at the hourly rate specified as the basic regular hourly rate in the written contract executed by the respective employees and defendant and in instances where the hourly rate was increased then at such increased hourly rate." [R. 34.]

"Continuously from and since July 1, 1942, each field employee was compensated and paid by defendant in accordance with the terms of the written contract executed by said employee with defendant and where the basic hourly rate of pay and weekly guarantee were increased, then and thereafter in accordance with the contract as so modified. For each hour worked in excess of forty in each workweek from and since July 1, 1942, each field employee received from defendant as compensation an amount equal to or in excess of an amount one and one-half times the hourly rate specified in the written contract of employment executed by such employee with defendant and where the hourly rate was increased, then an amount at least one and one-half times the increased hourly rate. Continuously from and since July 1, 1942, each field employee received for all hours worked in each workweek a sum of money not less than the aggregate of the product of the number of forty hours or less and the hourly rate specified in his contract, plus the product of the number of hours in excess of forty and an amount one and one-half times said specified hourly rate." [R. 35-36.]

"Defendant has found by actual experience and the court finds that the plan of compensating defendant's field employees as set forth in the written contracts between defendant and said field employees was and is better adapted to defendant's field employees than the irregular workweek plan recommended by the Administrator and that the plan set forth in said contracts was preferred by the majority of defendant's field employees." [R. 40-41.]

Neither in the Circuit Court of Appeals nor here has petitioner made any specification that the findings above quoted are not supported by the evidence.

Summary of Argument.

The employees here involved were compensated for overtime hours at rates not less than one and one-half times the regular rates at which they were employed. The employment contract provided for an agreed hourly rate of pay for the first 40 hours worked in a workweek and not less than one and one-half times such agreed hourly rate of pay for all times over 40 hours in any workweek. The agreed regular rate is not overridden by the provision for a minimum guaranty which includes, and was intended to include, compensation at not less than the overtime rate for overtime hours as well as compensation at the regular rate for the first 40 hours worked in a workweek. The employment contract here involved is substantially the same as the employment contract which this Court held valid and not violative of the Act in *Walling v. A. H. Belo Corporation,* 316 U. S. 624 and the decision in the *Belo* case controls this case. No substantial differences in practice exist to distinguish this case from the *Belo* case. Practically all of the matters upon which petitioner relies in an attempt to distinguish this case from the *Belo* case were also present in the *Belo* case. The agreed hourly rate specified in the employment contract was the regular rate at which the employee was employed. This is evidenced by the contract and the practices of the parties. Both lower courts concurred in the finding that the agreed hourly rate was the regular rate and such finding should not here be disturbed. The payment of

compensation in accordance with the employment contract does not violate the statutory purposes. For all hours worked in excess of 40 in a workweek, the employee receives not less than 150% of his regular hourly rate, whether such overtime hours are compensated by the weekly guaranty or by additional compensation. The Irregular Workweek Plan which petitioner asserts should here apply gives incentive to longer hours since both the regular rate and the overtime rate decrease with the increase of the number of hours worked. The cases relied upon by petitioner involved employment contracts entirely different than the one here involved. Such cases are clearly distinguishable from the *Belo* case and the distinction was expressly recognized by this Court. The decision of this Court in the *Belo* case should not be overruled. It complies with the Act and fulfills the intent of Congress. The decision in the *Belo* case has been recognized and relied upon as established law by the public and has been recognized as having continued authority by subsequent decisions of this Court. The decision of this Court in the *Belo* case should be adhered to in order to avoid uncertainty and unfortunate practical results from a change in decision and for the purpose of imparting stability to the interpretation of the Fair Labor Standards Act.

ARGUMENT.

I.

The Employees Were Compensated for Overtime Hours at Rates Not Less Than One and One-Half Times the Regular Rates at Which They Were Employed.

This case does not involve workweeks in which respondent's field employees worked 40 hours or less. It is limited to workweeks in which more than 40 hours were worked and the sole question involved is whether or not in such workweeks the employees were compensated for hours worked in excess of 40 at rates not less than one and one-half times the regular rates at which they were employed. The issue was expressly so limited in the District Court by stipulation of the parties [R. 67] and pre-trial order [R. 23].

Respondent and each of the employees here involved negotiated and executed a written employment contract whereby the employee was employed at an agreed hourly rate equal to or in excess of the statutory minimum for the first 40 hours worked in a workweek and not less than one and one-half times such agreed hourly rate for all hours worked in excess of 40, with a guaranty that the employee should receive for regular time and for such overtime as the necessities of the business might demand a sum not less than a specified amount for each workweek. It is undisputed that during the period here involved each of such employees was compensated in accordance with the terms of the employment contract.

Petitioner's argument in the most part is directed to the proposition that compensating an employee in accordance with such an employment contract, as a matter of law, necessarily violates the provisions of Section 7 of the Fair Labor Standards Act. This was his position in the District Court where petitioner's attorney stated, "We say if he has the guarantee he simply is not employed at the hourly rate" [R. 212]. Petitioner argues *de novo* the question of the validity of such employment contracts as if the question were without controlling precedent. The validity of such employment contracts is established by the decision of this Court in *Walling v. A. H. Belo Corp.*, 316 U. S. 624.

A. The Decision of This Court in the Belo Case Determines This Case.

In June, 1942, in the case of *Walling v. A. H. Belo Corp.*, 316 U. S. 624, this Court determined the validity of employment contracts practically identical with and to the same legal effect as the ones here involved. In that case the contracts were in letter form, the pertinent provisions of a typical one being as follows:

> ". . . we advise that from and after October 24, 1938, your basic rate of pay will be . . . 67 . . . cents per hour for the first forty-four hours each week and that for time over forty-four hours each week you will receive for each hour of work not less than one and one-half time such basic rate above mentioned, with a guaranty on our part that you shall receive weekly for regular time and for such overtime as the necessities of the business may demand, a sum not less than $40 . . . " (316 U. S. 628.)

Compare with the foregoing the pertinent provisions of a typical contract between respondent and its employees:

> "Employer agrees to employ Employee as a Cementer and to pay Employee for his services a regular basic rate of 59 cents per hour for the first (40) hours of any workweek, and not less than one and one-half times such basic hourly rate of pay for all time over (40) hours in any workweek, with a guarantee that Employee shall receive for regular time and for such overtime as the necessities of the business may demand a sum not less than $63.46 for each workweek." [R. 33, 481.]

In the *Belo* case this Court held that the employment contract and the payment of compensation in accordance with its terms was valid and not violative of the Act. This Court held that the agreed hourly rate specified in the employment contract was the regular rate at which the respective employees were employed and that compensating the employees for overtime hours pursuant to the provisions of the employment contract was not violative of Section 7 of the Act. In that case this Court said:

> "In its initial stage the question to which this dispute gives rise is a question of law, a question of interpretation of the statutory term 'regular rate.' But it is agreed that as a matter of law employer and employee may establish the 'regular rate' by contract. In the case before us such an effort has been made, and in the example given the regular rate has been specified as 67 cents an hour. The difficulty arises from the inclusion of the $40 guaranty. The problem is whether the intention of the parties

to set 67 cents an hour as the regular rate squares with their intention to guarantee a weekly income of $40. The Administrator's position is that these two objectives are inherently inconsistent and that the intention to fix the regular hourly rate at 67 cents is overriden by the intention to guarantee the $40 per week.

"We cannot agree." (316 U. S. 631.)

This Court further said:

"But the guaranty contract in this case carries out the intention of the Congress. It specifies a basic hourly rate of pay and not less than time and a half that rate for every hour of overtime worked beyond the maxmium hours fixed by the Act." (316 U. S. 634.) And further ". . . that is the agreement of the parties and it is within the letter, and the intention of the law." (316 U. S. 634.)

The petition by the Administrator for a rehearing was denied by this Court October 26, 1942 (317 U. S. 706).

Petitioner here urges that the agreed hourly rate in the employment contract and the fact that the guaranty is "compensation for overtime as well as basic pay" (316 U. S. 632), should be ignored; that the weekly guaranty should be held to be a weekly salary which pays for straight time only, and that the principles of *Overnight Motor Transportation Co. v. Missel*, 316 U. S. 572, should be applied (pp. 28-29). The *Missel* case was decided by this Court on the same day that it decided the *Belo* case and this Court expressly distinguished the type of contract involved in the *Belo* case, which is the type

here involved, from a contract merely for a weekly wage which was the type involved in the *Missel* case. In the *Missel* case this Court said:

> "It is true that the wage paid was sufficiently large to cover both base pay and fifty per cent additional for the hours actually worked over the statutory maximum without violating section six. But there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage . . . This contract differs from the one in Walling v. A. H. Belo Corp. decided today (316 U. S. 624, post 1716, 62 S. Ct. 1223), where the contract specified an hourly rate and not less than time and a half for overtime, with a guaranty of a fixed weekly sum, and required the employer to pay more than the weekly guaranty where the hours worked at the contract rate exceeded that sum." (316 U. S. at 581.)

To the same effect is *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, where this Court said:

> "Respondents were employed on the basis of an eight hour day and regularly worked seven days a week, receiving fixed wages ranging from $6.50 to $11 per day. There was no agreement providing for an hourly rate of pay or that the weekly salary included additional compensation for overtime hours." (317 U. S. at 93.)

The decision of this Court in the *Belo* case has not been overruled. In the recent cases of *Walling v. Helmerich & Payne*, 323 U. S. 37; *Walling v. Youngerman-Reynolds Hardwood Company*, and *Walling v. Harnisch-*

feger Corporation, 325 U. S. 419, the cases upon which petitioner here relies, this Court expressly distinguished the employment contracts there involved from the type of employment contract involved in the *Belo* case. As stated by the Circuit Court of Appeals for the Ninth Circuit in this case, "The Administrator argues that in subsequent decisions the *Belo* case has been whittled down to a very narrow compass. However, in these later cases the Court has carefully and consistently refrained from overruling the earlier decision or denying its continued authority." [R. 481; 152 F. (2d) 622, 624.]

In the main the petitioner's brief in this case is an attack upon the decision of this Court in the *Belo* case. It is an attempt on the part of petitioner to have this Court again consider the correctness of that decision. Practically all of the points and argument here made were presented in the *Belo* case. There was received in evidence in this case the transcript of the record in the *Belo* case [Ex. "D"; R. 321] and the Administrator's briefs in the Circuit Court of Appeals [Ex. "E" and "E-2"; R. 325] and the Administrator's briefs in this Court [Ex. "F-1" and "F-2"; R. 325, 326] filed in the *Belo* case. These documents were not reproduced in the printed transcript but by order of the Circuit Court of Appeals for the Ninth Circuit were considered by that Court in their original form [R. 479]. As contended here, the Administrator contended in the Circuit Court of Appeals in the *Belo* case that the agreed hourly rate was meaningless and that the contract in effect was for a weekly salary [Ex. "E-2," p. 45, *et seq.*]. The same contention was made in this Court [Ex. "F-1," p. 14, *et seq.*; see also 316 U. S. at 361]. As here, the Administrator contended in the *Belo* case that the hourly rates

provided in the employment contracts were fictitious [Ex. "E-2," p. 47, Ex. "F-1," p. 37]; that the contract enabled the employer to avoid paying real overtime wages for hours in excess of the first 40 hours worked in a work-week [Ex. "E-2," pp. 52, 63; Ex. "F-1," p. 31]; that the contract permitted overtime compensation to be computed on an "unrealistic rate" lower than the rate employee actually received [Ex. "E-2," pp. 32, 52, 55, 67]; that the contract permitted the employer to avoid the disadvantage of overtime, namely, an increase in the cost of labor [Ex. "E-2," pp. 27, 67]; and that the computation of overtime in accordance with the terms of the contract resulted in greater rate of pay for fewer hours and a less rate of pay the more hours were worked [Ex. "E-2," p. 64]. These points and arguments were considered by the appellate courts in the *Belo* case and answered by the decision of this Court affirming the judgment.

The contracts here involved, being the same as those under consideration in the *Belo* case, the decision of this Court in the *Belo* case is here applicable and controls the determination of th case at bar.

B. No Substantial Differences in Practice Exist to Distinguish This Case From the Belo Case.

Under point II of his brief (p. 29, *et seq.*) petitioner attempts to distinguish the facts in this case from those involved in the *Belo* case. That there is no substantial difference between the two cases is tacitly conceded by the statement "If the two cases are not considered distinguishable, however, we submit that the Belo decision should not be followed . . ." (p. 32). Practically all matters referred to under this point also existed in the *Belo* case.

Petitioner states, as a ground for distinguishing the instant case from the *Belo* case, that "respondent's employees received their weekly salaries in a substantial number of weeks in which they worked less than forty hours" (p. 31). What petitioner means is that in such weeks the employee received the amount of his weekly guaranty. By the terms of the employment contract respondent was obligated to pay to the employee not less than the amount of the stipulated weekly guaranty irrespective of the number of hours worked. In making such payment respondent did no more than what it was required to do under the employment contract. The same obligation was contained in the employment contract involved in the *Belo* case which established the validity of an employment contract containing such obligation. The contract being in compliance with the Act, performance of its terms could not constitute non-compliance. The record in the *Belo* case establishes that in that case the weekly guaranty was paid in workweeks in which the number of hours worked were forty or less and the fact was referred to and argued in the briefs of the Administrator, both in the Circuit Court of Appeals and in this Court. In his opening brief in the Circuit Court of Appeals [Ex. "E-2"] the Administrator stated:

> "Under this provision, therefore, the full salary is paid whether overtime is worked or not" (p. 21); "if no overtime is worked, the employee nevertheless receives his 'guaranteed' weekly wage" (p. 23); "The employees involved here are paid fixed weekly salaries, regardless of the number of hours worked each week. They receive the same salaries whether or not overtime is worked" (p. 46); "Of course if no overtime is worked, the employee nevertheless receives his full salary" (p. 54).

In his reply brief in the Circuit Court of Appeals [Ex. "E," p. 4], the Administrator stated:

> "Although appellee maintains that workweeks in which an employee received his guaranteed weekly wage, even though no overtime was worked were rare . . . an examination of the payroll transcriptions [R. 194-337] reveals the contrary. Out of approximately 1100 man workweeks about 212, or 20%, are workweeks in which the employees did not work in excess of the statutory maximum."

Reference to this fact was also made in the Administrator's brief in this Court [Exhibit "F-1," pp. 35 and 36]. In the *Belo* case this Court had before it the opinion of the Circuit Court of Appeals for the Fifth Circuit which was specifically referred to in the opinion of this Court (316 U. S. at 629). In the opinion of the Circuit Court of Appeals there was a quotation from the argument contained in the Administrator's brief which included the following:

> "On the facts of this case, it cannot be said that the fixed weekly salary included overtime compensation because as a matter of fact, the full salary was earned by the employee when no overtime was worked." (121 F. (2d) at 210, n. 6.)

In his brief here, petitioner concedes that the record in the *Belo* case discloses that the weekly guaranty was there paid in workweeks where less than the statutory maximum hours were worked but states,

> "However, the significance of these facts was not fully appreciated prior to this Court's decision, and, therefore, they were not emphasized when that case was under consideration" (p. 32, n. 18).

In view of the quoted excerpts from the Administrator's briefs in the *Belo* case, the explanation seems groundless. In view of the emphasis placed upon the fact in the Circuit Court of Appeals, any failure to emphasize them before this Court would indicate that the Administrator gave such facts little weight and abandoned the argument based upon them. Furthermore, the Administrator filed a petition for rehearing in this Court (317 U. S. 706) and thus had ample opportunity to enlighten this Court on the point. A mere reading of the form of contract in the *Belo* case would disclose that the employer was obligated to pay the weekly guaranty in workweeks in which 40 hours or less were worked and it is inconceivable, particularly in view of the record, that this Court was unaware that the employer actually did so. In the *Belo* case the number of man workweeks in which the weekly guaranty was paid where no overtime hours were worked was 20% of the total workweeks, while in the instant case it was only about 14% [R. 381]. It thus conclusively appears that this asserted ground for attempting to distinguish the instant case from the *Belo* case is without merit.

The payment of the weekly guaranty in workweeks where 40 hours or less are worked is not evidence that the actual rate at which the employees were employed was other than as set forth in the written contract. It is evidence of the performance of the written contract and therefore evidence that the written contract expressed the real agreement between the parties. This situation is not novel in the law. An analogous instance is a mining lease providing for payment of a specified royalty per ton of ore removed with a minimum guaranty. If the amount of ore mined at the specified royalty is less than the mini-

mum guaranty, the lessee nevertheless is obligated to pay the amount of the minimum guaranty. Such payment does not establish that the royalty is other than the agreed royalty specified in the lease. In subsequent periods one would not ascertain the royalty by dividing the minimum guaranty by the number of tons mined during the period when the minimum guaranty was paid. Where irregular hours are worked, each week is taken by itself without reference to other weeks. As stated by the Administrator,

> "It must be remembered that the Fair Labor Standards Act takes a single workweek as its standard and permits no averaging of hours over two or more weeks. For the purposes of the act each week stands alone." [Interpretative Bulletin No. 4, Par. 29, R. 240; see also *Overnight Transportation Co. v. Missel,* 316 U. S. at 580.]

Petitioner states that 84 hours of work paid for by the guaranty bore no relation "to the regular or usual number of hours worked by the employees" (p. 31). The employees here worked irregular and a fluctuating number of hours. There was no "regular" or "usual" number of hours worked by the employees here under consideration. The hours fluctuated too widely from week to week. Exhibit "J" [R. 366-367, 365] illustrates the wide fluctuation for an employee in consecutive workweeks. Thus for employee Alexander, during the three consecutive weeks between July 5 and July 25, 1942, the number of hours fluctuated from 28 to 81½, and during the three weeks from January 3 to January 23, 1943 they varied from 60 to 124, and from July 4 to July 24, 1943 they fluctuated from 17 to 118, and from January 2 to January 22, 1944 from 13 to 66. Under such circumstances there could be no "regular" or "usual" workweek.

The weekly guaranty in the *Belo* case paid for 54½ hours in a workweek. But 54½ hours was not the "regular" or "usual" workweek. As stated by the Administrator in the *Belo* case in his brief [Exhibit "E-1," p. 11], in the Circuit Court of Appeals, "the usual workweek for men was around 48 hours and women employees usually worked 44 hours a week [R. 63-64]." It thus appears that petitioner's second claimed ground for distinguishing the instant case from the *Belo* case is without merit.

Petitioner contends that here there was a fixed overtime rate and that therefore the theory of a fluctuating overtime rate in a workweek where 84 hours are worked is inapplicable (p. 32). This contention is without foundation. The agreement between respondent and its employees was that they should receive "not less than one and one-half times" the regularly hourly rate and there was no other agreement between them. Petitioner's contention is based upon the chart [R. 73] which listed the regular rate and overtime rate as a convenience in computing overtime compensation in workweeks where more than 84 hours were worked. The overtime rate shown on the chart was for use only when an employee worked more than 84 hours [R. 112] and had no use at all where the employee worked less than 84 hours in a workweek [R. 316]. Petitioner also refers to the bi-weekly payroll form adopted in January 1944. This form provided for detailed information, including the difference between compensation actually paid and an amount computed at the hourly rates. This was done, however, solely because respondent understood that the Wage and Hour Division desired the payroll form to show a complete detailed statement [R. 386] with which respondent endeavored to comply. During the major portion of the period here in-

volved, namely, from July 1, 1942 to January 16, 1944 no such "break down" appeared on any of the payroll records.

In the employment contracts here involved the weekly guaranties were higher, at least relatively, than were the weekly guaranties in the contracts involved in the *Belo* case. Here the weekly guaranties paid for the first 40 hours in the workweek at the contract hourly rate and for 44 additional hours at not less than one and one-half times the specified hourly rate. The number of hours worked by the employees here fluctuated much more widely than in the *Belo* case and the range of the number of hours worked was considerably greater. The hours worked in a workweek fluctuated from 0 to 159 [R. 226]. For example, with respect to a typical employee they fluctuated in periods of three consecutive workweeks from 28 to 81½, 60 to 124, 17 to 118, and from 13 to 66 [R. 366]. The high number of hours shown on the records was caused by the inclusion of many hours spent in resting or other pursuits while waiting on location [R. 429] or idle time at the base when there was nothing to do [R. 436]. The relatively higher guaranty was the adaptation of the *Belo* type contract to the unusual circumstances attending oil well servicing. As said by Mr. Justice Frankfurter in his concurring opinion in the *Youngerman-Reynolds* and *Harnischfeger* cases,

> "Nor does the Act bar an agreement establishing an hourly 'regular rate' that does not fall short of the statutory minimum even though it be complicated by a guaranteed weekly lump sum wage adapted to the circumstances of a particular employment, provided it is not a mere artifice unrelated to wage-earning actualities. Walling v. A. H. Belo Corporation, 316 U. S. 624" (325 U. S. at 433.)

The higher guaranty gave the employee here more security and enabled him to maintain a higher standard of living. As was said by this Court in the *Belo* case,

> "Many such employees value the security of a regular weekly income. They want to operate on a family budget to make commitments for payments on homes, automobiles and insurance. Congress has said nothing to prevent this desirable objective." (316 U. S. at 635.)

C. The Agreed Hourly Rate Specified in the Employment Contract Was the Regular Rate at Which the Employee Was Employed.

In his brief under the heading "the hourly rate specified in the contracts did not in fact control the compensation received by respondent's employees" (p. 13), petitioner advances various arguments endeavoring to show that the agreed hourly rate specified in the employment contract was not the regular rate at which the employee was employed. Practically all, if not all, of such arguments could have been advanced and actually were advanced in the *Belo* case and all of such arguments effectively were answered and determined by this Court's decision in that case.

Petitioner contends that since the weekly guaranty was paid in workweeks in which less than 84 hours were worked that "the guaranty actually controlled the compensation paid" and that the guaranty "must be considered . . . as determinative of the regular rate" (p. 14). It is true that the guaranty was paid in such

workweeks but the conclusion drawn by the petitioner is unsound as is established by the decision of this Court in the *Belo* case. As this Court said in that case:

> "... although it is perfectly true that when the employee works less than 54½ hours during the week his pay is determined by the $40 guaranty, it does not dispose of the problem simply to say this. The question remains whether the $40 contemplates compensation for overtime as well as basic pay. The contract says that the employee is to receive 67 cents an hour for the first 44 hours and *'not less than* one and one-half time such basic rate' for each hour over 44. Consequently, if an employee works 50 hours in a given week, it might reasonably be said that his $40 wage consists of $29.48 for the first 44 hours (44 x $.67) plus $10.52 for the remaining six hours (6 x $1.753). To be sure, $1.753 is more than 150% of $.67. But the Act does not prohibit paying more; it requires only that the overtime rate be 'not less than' 150% of the basic rate. It is also true that under this formula the overtime rate per hour may vary from week to week. But nothing in the Act forbids such fluctuation." (316 U. S. 632.)

In the instant case there is a substantially smaller percentage of workweeks in which the employees worked less than 84 hours than the percentage of workweeks in the *Belo* case where the employees worked less than 54½ hours. Conversely, here there is a substantially greater percentage of workweeks in which compensation was paid in addition to the weekly guaranty than existed in the *Belo* case. As stated by the Administrator in his briefs in the *Belo* case, out of approximately 1100 man workweeks in only 71 were hours worked in excess of

those paid for by the weekly guaranty [Exhibit "E," p. 2 and n. 2, p. 4]. Thus in the *Belo* case in only 6.4% of the total workweeks were the number of hours worked sufficient to earn additional compensation above the weekly guaranty, leaving 93.6% of the workweeks in which the employee worked 54½ hours or less. In the case at bar, during the period involved, there was a total of 4,284 man workweeks and in 20% of the total workweeks the hours worked exceeded 84 [R. 384] and for such excess hours the employee received compensation in addition to the weekly guaranty at a rate not less than one and one-half times the hourly rate specified in the employment contract [R. 333]. In over 87% of the total workweeks during the period the number of hours worked exceeded 40 [R. 384, 226].

Petitioner claims that respondent had a specific overtime rate but we have shown above that this contention has no basis in fact.

Petitioner refers to the fact that where only one or two overtime hours are worked the overtime rate bears a high ratio to the regular rate and that the overtime rate decreases as the number of hours worked increases. This fact proves nothing. The same situation existed in the *Belo* case. Using the typical contract in the *Belo* case, the overtime rate for the first hours worked after the statutory maximum is approximately 2,000% of the regular rate and where two overtime hours are worked the overtime rate is approximately 1,000% of the regular rate and where three overtime hours are worked the overtime rate is approximately 666⅔% of the regular rate. Petitioner refers to the decreasing ratio between the regular rate and the overtime rate as an anomaly and claims it disregards the historical function which an

overtime rate is intended to fulfill, and also the general practice in American industry (p. 18). The same situation, however, exists in the Irregular Workweek Plan which the Administrator advocates and which he contends should apply in this case. Under the Irregular Workweek Plan not only does the overtime rate decrease as the number of hours worked increases but even the regular rate decreases as the hours worked increase. "It is true that the longer the hours the less the rate and the pay per hour" (*Missel* case, 316 U. S. at 580). Assume a weekly wage of $40 under the Irregular Workweek Plan. If no overtime is worked the regular rate is $1.00 per hour. If 20 hours of overtime are worked the regular rate drops to 66⅔¢ per hour and the additional overtime pay is 33⅓ cents per hour. If, however, 40 overtime hours are worked the regular rate drops to 50 cents and the additional overtime pay drops to 25 cents per hour. A decrease in both the overtime rate and the regular rate as longer hours are worked is more of an anomaly than if only the overtime rate decreases. In any event, petitioner's argument heretofore has been answered by this Court in its decision in the *Belo* case. This Court there said:

> "It cannot be denied that the flexibility of the overtime rate is considerable, but this flexibility may well have been intended if it was the only means of securing uniformity in weekly income. Moreover, under the Administrator's interpretation, the regular rate in the example given is $40 divided by the number of hours worked each week. Since the number of hours worked fluctuates so drastically from week to week, this 'regular' rate is certainly 'irregular' in a mathematical sense. And inasmuch as it cannot be calculated until after the workweek has been com-

pleted, it is difficult to say that it is 'regular' in the sense that either employer or employee knows what it is or can plan on the basis of it." (316 U. S. at 632-633.)

Petitioner refers to the fact that the original sample payroll sheet listed the monthly equivalent of the weekly guaranty (which petitioner inaccurately refers to as monthly salary) and did not list the hourly rate. Respondent was endeavoring to eliminate as much clerical work in the field offices as possible, particularly due to the scarcity of such help in wartime. Since the hourly rate was carried on other records there was no occasion to list such rates on the payroll sheets made out in the field offices. This was particularly true since originally the computation of overtime hours worked in excess of 84 was made at the home office in Oklahoma [R. 82].

In his brief at page 15, petitioner quotes a detached excerpt from an instruction to the field offices that "'overtime rate . . . has no practical use unless the employee works in excess of 84 hours in a single workweek' [R. 316]" and infers that such statement referred to the "effect of the employment contract." This is misleading. The quoted excerpt referred to the use of the column of overtime rates on the chart [R. 73] as the record herein clearly shows [R. 316]. This was merely the communication to the clerical help in the field offices that computation of overtime rate from the chart was unnecessary unless the number of hours worked exceeded 84. This was true since the guaranty paid for 40 hours at the regular rate and an additional 44 hours at not less than one and one-half times the regular rate.

Petitioner refers to the fact that the amount of the weekly guaranty was reduced where the employee failed to work a full workweek (p. 15). During the period involved, out of a total of 4,458 workweeks, there were only 174 instances where an employee worked less than a full workweek [R. 335]. 92% of such partial workweeks were due to an employee commencing or terminating his employment during the pay period [R. 336]. In only 4 instances was any deduction made for voluntary layoff [R. 336]. It was necessary and only justice to reduce the amount of the weekly guaranty where the employee failed to work a full workweek. The employee was paid at the hourly rate specified in the contract for the first 40 hours and at least one and one-half times such specified hourly rate for all overtime hours, or the prorata amount of his weekly guaranty, whichever was the greater [R. 380]. Respondent believed that it was obligated so to do [R. 334].

Petitioner states that "a plan which depends upon a fluctuating overtime rate for its validity is no less artificial than the so-called 'x-plan' . . ." (p. 18) and then devotes two pages of his brief in attacking the so-called "x-plan." Respondent is not here to advocate or to defend the so-called "x-plan" but confines itself to upholding the type of employment contract which this Court in the *Belo* case held valid and not violative of the Fair Labor Standards Act. It may not be amiss to point out that the type of employment contract involved in the *Belo* case and here involved bears no resemblance to the so-called "x-plan." Under the "x-plan" the regular rate not only is not agreed upon but is unknown until after the workweek is completed and it is upon this later determined amount that the overtime rate is based. In the

Belo type employment contract the regular rate is agreed upon and fixed in advance and the overtime rate is not less than one and one-half times the regular rate so fixed and agreed upon. The so-called "x-plan" bears more similarity to the Irregular Workweek Plan than to the type of employment contract here involved. In both the "x-plan" and the Irregular Workweek Plan the amount of the regular rate is unknown and cannot be determined in advance but is arrived at by computation after the completion of the workweek.

That the agreed basic hourly rate specified in the employment contract is the regular rate at which the employee was employed is clearly established by the record. Respondent and each employee negotiated and executed a written contract wherein it was agreed between them "Employee agrees to employ Employee as a cementer and to pay Employee for his services a regular basic rate of 59 cents per hour for the first (40) hours of any workweek . . . ." Nothing could be clearer than that this was the regular rate at which the employee was employed for the first 40 hours of any workweek. The regular employment agreement further provided that for all time over 40 hours in any workweek employee should be paid not less than one and one-half times such basic hourly rate of pay and that the employee should "receive for regular time and for such overtime as the necessities of the business may demand a sum not less than $63.46 for each workweek." It is indubitably clear that where overtime hours were worked that the weekly guaranty paid for the first 40 hours at straight time and for all overtime hours (not exceeding 44) at not less than one and one-half times the straight time rate. In other words, the weekly guaranty included pay for overtime hours

at not less than the minimum overtime rate. Petitioner here, however, contends that the guaranty paid for all hours worked only at the straight time rate. This contention is entirely at variance with the intent of the parties. That petitioner's contention violates the intent of the parties is demonstrated in this case by the fact that the employees received compensation in addition to the weekly guaranty and such additional compensation was computed at a rate of one and one-half times the basic hourly rate specified in the contract. If, as petitioner contends, the weekly guaranty was merely a weekly wage paying for all hours worked at straight time, the additional compensation for such hours would be on a basis of only one-half times the straight time rate. In some instances the straight time rate calculated under the Irregular Workweek Plan would be substantially less and the basic hourly rate specified in the employment contract. This is demonstrated by Exhibit "J" [R. 366-367]. For the week ending January 16, 1943, H. L. Alexander's contract straight time rate was 48¢, but computed on the Irregular Workweek Plan would be only 42¢. The additional compensation for overtime hours would be at the rate of 21¢ per hour under the Irregular Workweek Plan, while under the contract it would be not less than 72¢. The total compensation received for the week, computed under the Irregular Workweek Plan, would be $77.96, while the total compensation under the contract would be not less than $80.72. For the week ending July 17, 1943, the basic hourly rate under the contract was 55¢, while computed under the Irregular Workweek Plan it would

be only 50¢ and the total compensation received under the Irregular Workweek Plan would be substantially less than the amount actually paid Mr. Alexander for that week under the employment contract. During the period involved there is a total of 4,284 full workweeks. In 20% of the total workweeks—one out of every five—[R. 384] compensation was paid the employees in addition to the weekly guaranty. Such additional compensation was at a rate of not less than one and one-half times the hourly rate specified in the employment contract [R. 333]. "In this situation, then, it is clearly the guaranty that becomes inoperative and the 67-cent hourly rate fixed by the contract that is controlling." (*Belo* case, 316 U. S. at 632.) The payment of compensation in addition to the weekly guaranty at the rate of not less than one and one-half times the basic hourly rate specified in the contract is consistent only with the premise that the agreed hourly rate was the regular rate at which the employee was employed. It would be wholly inconsistent with petitioner's contention that the guaranty was a weekly salary which paid for all hours worked at straight time. The foregoing, we submit, establishes that the basic hourly rate specified in the employment contract was the regular rate at which the employee was employed. The District Court expressly found that the employment contract "was intended to and did really fix the regular rate at which each of the respective field employees was employed" and "each field employee agreed to be employed and was employed at the hourly rate specified as the basic regular hourly

rate in the written contract" [R. 34]. The Circuit Court of Appeals concurred in this finding [R. 48].

In so far as petitioner's contentions are based solely upon the contract, the present a question of law which we submit has been determined by this Court in the *Belo* case. In so far as such contentions are based upon the contract and evidence extrinsic to the writing, they present a question of fact which has been determined by both lower courts. We submit that the foregoing findings, being concurrent findings of the two lower courts, should be accepted by this Court without reexamination of the evidence.

General Talking Picture Corp. v. Western Electric Co.; 304 U. S. 175, 178;

United States v. McGowan, 290 U. S. 592;

United States v. Commercial Credit Company, 286 U. S. 63, 67;

Page v. Arkansas Nat. Gas Corp., 286 U. S. 269, 271;

Allen v. Trust Company of Georgia (U. S.), 90 L. Ed. Adv. Ops. 305 at 308, decided January 28, 1946.

In the case last cited the Court said:

"Here two courts have resolved that question of fact in favor of respondents . . . Those findings, being concurrent findings of the two lower courts, will be accepted here without reexamination of the evidence. See United States v. O'Donnell, 303 U. S. 501, 508, 82 L. Ed. 980, 984, 58 S. Ct. 708, and cases cited."

D. Payment of Compensation in Accordance With the Employment Contracts Does Not Violate the Statutory Purposes.

Petitioner argues the converse of this proposition beginning at page 20 of his brief. Petitioner's argument is founded on the assumed erroneous premise that respondent's field employees are not compensated for overtime hours worked at a rate of at least 150% of the rate of compensation for the first 40 hours worked. This false premise permeates all of petitioner's discussion under this point. The conclusions drawn by petitioner fall with the false premise.

The fact is that for each hour worked in excess of 40 hours in a workweek each of respondent's employees is compensated at a rate at least 50% more than the rate of compensation for each of the first 40 hours. This is true whether such overtime hours are within the number paid for by the weekly guaranty or are hours in excess of such number. Under the employment contracts here involved the regular rate remains constant and the employee receives at least one and one-half times such rate for every overtime hour worked. He never receives less, though sometimes he may receive more, and as said by this Court, "But the Act does not prohibit paying more; it requires only that the overtime rate 'be not less than' 150% of the basic rate" (316 U. S. at 632). If the employee works more hours in a workweek than are paid for by the weekly guaranty (as was often done here), the overtime rate is constant, being always equal to or slightly in excess of 150% of the agreed basic hourly rate.

The Act here involved does not limit the number of hours that an employee may work, provided the employee

is compensated for hours in a workweek in excess of 40 at a rate not less than 50% higher than the rate paid for the first 40 hours of work. "If he is paid time and one-half for overtime, he may work as many hours in a week as he and his employer see fit" (Interpretative Bulletin No. 4, Par. 1, R. 233]. That was done here. Petitioner's extended discussion of the establishment in certain industries of limited workweeks without payment of overtime appears irrelevant and superfluous. This matter now expressly has been covered by the Fair Labor Standards Act in providing that time and one-half must be paid for all hours over 40.

Petitioner argues under this point that this type of contract encourages employers to work the employee more than 40 hours in a workweek since it is to his financial advantage so to do. But the same financial incentive to work employees longer hours exists under the Irregular Workweek Plan which the Administrator has officially approved and which he urges should be applied here. Under that plan the longer the hours worked the lower is both the regular rate and the overtime rate. Assume an employer has 600 hours of work each week and he pays his employees $60 per week. If he employs 12 men to do the work they will each work 50 hours and the regular rate will be $1.20 per hour and for the 10 overtime hours they will receive additional compensation of 60¢ per hour. The total cost for the 12 employees will be $792. If he has only 10 employees to do the work each of such employees will be required to work 60 hours. Their hourly rate will be $1.00 with additional compensation for the 20 hours of 50¢ per hour. The total cost for the 10 men will be only $700. Therefore, under the Irregular Workweek Plan the employer would save $92 each

week by employing only 10 men and working them 60 hours per week, as compared to employing 12 men and employing them only 50 hours per week.

If one is "realistic" it must be clear that there is a limit to the amount that an employer economically can pay for a particular type of work. It also must be clear that if the contracts here involved were held invalid respondent would be compelled to adopt some other plan of compensation whereby the same work done would cost him approximately the same amount. If respondent adopted the Irregular Workweek Plan the amount of the weekly wage would be fixed at an amount substantially less than the amount of the weekly guaranty specified in the contracts now in effect, so that the cost to the employer and the amount received by the employee would not substantially increase the labor cost. In view of the wide fluctuation in the volume of work in this industry and the absence of respondent's control over the volume or the time when it must be done, it is most improbable that the change in plan would spread employment. In slack periods respondent could not afford to carry additional men on its payroll and in busy periods additional trained men are not obtainable. Furthermore, the Irregular Workweek Plan would be less satisfactory to the employees. Since the weekly wage would pay for straight time only, it necessarily would be substantially less than the amount of the weekly guaranty provided in the present contract. In busy periods the employee's income may be somewhat higher than it now is but in slack periods his income would be substantially less. The employee would lose "the security of a regular weekly income" which many employees value and which this Court has considered a "desirable objective" (316 U. S. at 635). The District Court in

this case found that the existing plan was more satisfactory than the irregular workweek plan [R. 40-41].

The same arguments made here by petitioner under this point were likewise urged before this Court in the petitioner's brief in the *Belo* case, and likewise in his petition for a rehearing by this Court in that case. Petitioner's argument on this point has been answered and the question definitely settled by the decision of this Court in the *Belo* case and in the numerous subsequent decisions of this Court recognizing its continued authority.

E. The Cases Relied On By Petitioner Are Clearly Distinguishable.

In his brief in this Court petitioner relies almost entirely upon general language in the opinion of this Court in the cases of *Walling v. Helmerich & Payne, Inc.*, 323 U. S. 37; *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U. S. 410, and *Walling v. Harnischfeger Corp.*, 325 U. S. 427. Each of these three cases involved types of employment contracts entirely different than the one here under consideration and under consideration in the *Belo* case. In each of the cases relied upon by petitioner the employment agreement provided that the overtime rate should be computed by use of a designated regular rate which was less than the amount actually received by the employee for the first 40 hours worked in a workweek where overtime hours were worked.

In the *Helmerich & Payne* case the employees worked shifts or tours of 8, 10 or 12 hours each. In each shift

or tour one-half of the hours worked were paid for at a specified rate and the other half of the hours worked in the shift or tour were compensated at one and one-half times such specified rate. For example, in an 8-hour tour the employee received a "regular rate" of 70 cents an hour for the first 4 hours and an "overtime" rate of $1.05 for each of the remaining 4 hours of each tour (323 U. S. at 38, n. 1). It is apparent that the employee's compensation for the first 40 hours worked was not the product of 40 and the "regular rate" of 70 cents, or $28.00, but was $35.00. The actual average hourly rate for the first 40 hours worked in a workweek therefore was not 70 cents but 87½ cents. Hours worked in excess of 40 in a workweek were not compensated at a rate of one and one-half times 87½ cents. All hours worked in the sixth tour were overtime hours, for the first 4 of which he was compensated at the rate of 70 cents an hour and for the remaining 4 at the rate of $1.05 per hour. Thus, for the first 4 overtime hours the employee was not even compensated at one and one-half times the designated "regular rate" of 70 cents but only at the designated straight time rate. By reason of these facts this Court held the employment contract invalid. In that case the Court said,

> "The vice of respondent's plan lay in the fact that the contract regular rate did not represent the rate which was actually paid for ordinary, non-overtime hours, nor did it allow extra compensation to be paid for true overtime hours". (323 U. S. at 41).

The so-called "split-day plan" involved in the *Helmerich & Payne* case bears no resemblance to the type of employment contract involved in the *Belo* case or here involved. This Court expressly recognized the distinction and there said:

> "Nothing in this Court's decision in Walling v. A. H. Belo Corp., 316 U. S. 624, 86 L. Ed. 1716, 62 S. Ct. 1223, *supra*, sanctions the use of the split-day plan. The controversy there centered about the question whether the regular rate should be computed from the guaranteed weekly wage or whether it should be identical with the hourly rate set forth in the employment contract. There was no question, as here, pertaining to the applicability of the regular rate to the first 40 hours actually and regularly worked, with the overtime rate applying to all hours worked in excess thereof." (323 U. S. at 42.)

In the *Youngerman-Reynolds* case, by the terms of the contract the overtime pay was computed upon a specified amount which was not the rate at which the employee was paid for the first 40 hours in a workweek where overtime hours were worked. The contract also provided for compensation upon a piecework basis and this basis of compensation applied to the work done during the first 40 hours of the workweek as well as work done during the hours in excess of the first 40. For each of the first 40 hours of work the employee actually received 59¢ per hour on the peacework basis instead of the specified regular rate of 35¢ per hour, but his overtime rate was computed solely on the specified rate of 35¢. This was held

to be a violation of the Act. The employment contract involved in the *Youngerman-Reynolds* case clearly is different from the one here involved and involved in the *Belo* case. This Court clearly recognized the distinction and said:

> "This Court's decision in Walling v. A. H. Belo Corp., 316 U. S. 624, 86 L. ed. 1716, 62 S. Ct. 1223, lends no support to respondent's position. The particular wage agreements there involved were upheld because it was felt that in fixing a rate of 67 cents an hour the contracts did in fact set the actual regular rate at which the workers were employed." (325 U. S. at 426.)

The *Harnischfeger* case involved an employment contract which provided for a basic hourly rate, plus an incentive bonus or piecework earnings. The incentive bonus was paid for work during the first 40 hours of the workweek as well as for overtime hours. The employee actually received during the first 40 hours worked in a workweek compensation at a rate higher than the specified hourly rate but overtime compensation was computed on the lower rate. This Court held that the incentive bonus was part of the regular rate of pay. Both the *Harnischfeger* and *Youngerman-Reynolds* cases involved piecework earnings. They were considered together by this Court and decided on the same day. The distinction between such contracts and the *Belo* type contract was expressly recognized by this Court in the *Youngerman-Reynolds* case as above noted. The distinction between

the two types of employment contracts was recognized in the concurring opinion of Mr. Justice Frankfurter in the two cases where it is said:

> "Nor does the Act bar an agreement establishing an hourly 'regular rate' that does not fall short of the statutory minimum even though it be complicated by a guaranteed weekly lump sum wage adapted to the circumstances of a particular employment, provided it is not a mere artifice unrelated to wage-earning actualities. Walling v. A. H. Belo Corp., 316 U. S. 624, 86 L. ed. 1716, 62 S. Ct. 1223;" (325 U S. at 433).

Petitioner makes no contention that this case falls within the decision of this Court in any of the three cited cases. Petitioner relies upon general language contained in the opinions. Such language was used by this Court in discussing an entirely different type of employment contract which this Court expressly recognized as being different. Petitioner has failed to heed the admonition of this Court

> "that words of our opinions are to be read in the light of the facts of the case under discussion . . . General expressions transposed to other facts are often misleading." (*Armour & Co. v. Wantock*, 323 U.S. 132-133.)

Thus, it clearly appears that each of the three cases relied upon by petitioner are actually clearly distinguishable from the type of contract here under consideration and this Court expressly recognized the distinction.

II.

The Decision of This Court in the Belo Case Should Not Be Overruled.

Petitioner's brief in the main is an attack upon the decision of this Court in the *Belo* case. Petitioner urges that if this case and the *Belo* case are not distinguishable "that the Belo decision should not be followed" (p. 32). We submit that the decision of this Court in the *Belo* case should not be overruled but should be adhered to for several independent reasons.

The type of contracts involved in the *Belo* case and here involved, we believe, complies with the provisions of Section 7 of the Fair Labor Standards Act of 1938. It provides for a regular hourly rate of pay for the first 40 hours worked in a workweek and for all hours in excess of 40 "at a rate not less than one and one-half times the regular rate at which he is employed." In some workweeks the overtime rate is greater than 150% of the regular rate "But the Act does not prohibit paying more; it requires only that the overtime rate be 'not less than' 150% of the basic rate" (316 U. S. 632). As stated by this Court in the *Belo* case, "the guaranty contract in this case carries out the intention of the Congress. It specifies a basic hourly rate of pay, and not less than time and a half that rate for every hour of overtime work beyond the maximum hours fixed by the Act," and that "Congress has said nothing to prevent this desirable objective" of "the security of a regular weekly in-

come." These statements are as true today as on the date of their pronouncement.

During the period of more than four years since the decision of this Court in the *Belo* case, the Congress has acquiesced in such construction of the statute and has refrained from amending the Act so as to require a different result. If the Congress deemed this Court's decision in the *Belo* case to be contrary to its intent, the matter could readily have been corrected by an amendment to the Act. There has been abundant opportunity for the Congress to give further expression to its will and it is well known that many bills have been introduced in the Congress to amend the Fair Labor Standards Act. No amendment has been adopted which would require a different result than expressed by this Court in its decision in the *Belo* case. This Court's construction of the Act in its decision in the *Belo* case should be adhered to, leaving it to Congress to amend the law should it deem a change necessary or desirable. Until such amendment is enacted this Court should "conclude that the interpretation of the Act then accepted has legislative approval."

United States v. Elgin J. & E. R. Co., 298 U. S. 492, 500.

See, also:

Apex Hosiery Co. v. William Leader, 310 U. S. 469, 487;

Missouri v. Ross, 299 U. S. 72.

Even if there were some doubt as to the soundness of this Court's decision in the *Belo* case, it should be adhered to in order to avoid confusion and unfortunate practical results from a change. The employment con-

tracts here involved were negotiated upon the faith of and in reliance upon the decision of this Court in the *Belo* case [R. 401] and undoubtedly other like contracts were executed in reliance upon that decision. Now to overrule the decision would result in extensive litigation and most substantial liability. The demarcation between valid and invalid wage plans under the Fair Labor Standards Act is now fairly well settled by the decision of this Court in the *Belo* case and in the later decisions in the *Helmerich & Payne*, *Harnischfeger* and *Youngerman-Reynolds* cases. Lower courts have relied upon and followed the decision of this Court in the *Belo* case and a change of decision would result in uncertainty. This Court has said with respect to a questioned decision.

> "a long period of accommodations to an older decision sometimes requires us to adhere to an unsatisfactory rule to avoid unfortunate practical results from a change."
>
> *Helvering v. Griffiths*, 318 U. S. 371, 403;
> *Davis v. Department of Labor of Washington*, 317 U. S. 249, 255.

If the decision of this Court in the *Belo* case were overruled and the decision made retroactive, the rights of respondent and its numerous employees who entered into the employment contracts, and the rights of numerous employers and employees who have executed a similar type of employment contract, would be impaired and such employers subject to potential liability of many hundreds of thousands of dollars. Where, as here, *bona fide* employment contracts have been entered into on the faith of and in reliance upon a decision of the highest Federal Court of the land construing a federal statute, such contracts and the rights thereunder acquired should not

be impaired by a change of construction made by a subsequent decision.

Moore-Mansfield Co. v. Electrical I. Co., 234 U. S. 619, 623;

Douglass v. County of Pike, 101 U. S. 677, 687;

Green County v. Conness, 109 U. S. 104;

Jackson v. Harris (C. C. A. 10), 43 F. (2d) 513, 516.

The decision of this Court in the *Belo* case has been recognized as established law since its pronouncement in June 1942. Concurrent and subsequent decisions in this Court have expressly referred to it as having continued authority, including the *Missel* case, the *Bradshaw Drilling Company* case, the *Helmerich & Payne* case, the *Harnischfeger Corporation* case and the *Youngerman-Reynolds* case. As stated by the Circuit Court of Appeals for the Ninth Circuit in this case, this Court "has carefully and consistently refrained from overruling the earlier decision or denying its continued authority." Such express recognition has tended to fortify the decision in the *Belo* case as established law. A substantial proportion of the citizens of this nation are affected by the Fair Labor Standards Act and it is important to them that there be stability in the interpretation of the Act. If the decision in the *Belo* case readily may be overruled then other decisions of this Court interpreting the Fair Labor Standards Act may be expected to be changed. Counsel and parties will bring and prosecute actions in the teeth of the decisions in the belief that the asserted rule will be changed or modified. While the doctrine of *stare decisis* is not rigid, it is an important principle of our jurisprudence and social policy. Our system of law is based upon the formulation

of and adherence to principles that will impart stability to and predictability of judicial discretion. As was said by the late Mr. Justice Cardoza in his work "The Nature of the Judicial Process" (p. 149), "adherence to precedent should be the rule and not the exception."

Conclusion.

The employment contract here under consideration is practically identical with the employment contract considered and held valid by this Court in the *Belo* case. No substantial differences in practice in the two cases exist. Practically all of the matters upon which petitioner relies in an attempt to distinguish this case from the *Belo* case were also present in the *Belo* case. The findings concurred in by both lower courts should not here be disturbed. The cases relied upon by petitioner involved employment contracts entirely different than the one here involved. Such cases are clearly distinguishable from the *Belo* case and the distinction was expressly recognized by this Court. The decision of this Court in the *Belo* case should not be overruled.

For the reasons herein set forth, we respectfully submit that the judgment should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 74.—October Term, 1946.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner, v. Halliburton Oil Well Cementing Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 14, 1947.]

Mr. Chief Justice Vinson delivered the opinion of the Court.

This case brings here a question as to the application of the overtime provisions of the Fair Labor Standards Act[1] to the payment of compensation pursuant to employment contracts similar to those in *Walling* v. *Belo Corp.*, 316 U. S. 624.

Respondent is engaged in the business of cementing, testing and otherwise servicing oil wells, for which it uses its own peculiar equipment. To operate this equipment respondent retains a highly stabilized group of skilled and specially trained "field employees." The volume of respondent's business, however, is highly inconstant.

[1] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.* The relevant overtime provisions, contained in § 7 (a), 29 U. S. C. § 207 (a), are as follows:

"No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

. . . . .

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Consequently, these employees are required to work a variable number of hours from day to day and from week to week.

Prior to passage of the Act in 1938, these employees were paid fixed monthly salaries. Thereafter, they were put on a "weekly-guarantee" plan similar to that which was to be involved in the *Belo* case. This plan was abandoned March 1, 1942, under pressure from the Administrator of the Act, and reinstated July 1, 1942, after the *Belo* decision had seemed to end all questions as to its legality.[2] Since its reinstatement the plan has been continuously in effect, and embodied in formal written contracts between respondent and the employees to whom it has applied.

The part of these contracts now in issue is respondent's agreement to pay these employees "a regular basic rate of [a specified number of] cents per hour for the first 40 hours of any workweek, and not less than one and one-half times such basic hourly rate of pay for all time over 40 hours in any workweek, with a guarantee that Employee shall receive for regular time and for such overtime as the necessities of the business may demand a sum not less than $ [a specified number] for each workweek."[3]

The regular basic rate so specified was in each case at or above the minimum prescribed by the Act or by the Administrator's order, but that rate was always so related to the guaranteed flat sum that the employee became entitled to more than the guarantee only in weeks in which he worked more than 84 hours.[4] The compensation

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[2] This Court decided the *Belo* case June 8, 1942.

[3] Compare the almost identical wording of the *Belo* contract, 316 U. S. at 628.

[4] For instance, the lowest specified basic rate in May, 1944, when this case was tried, was 40 cents an hour. Compensation at this rate for 40 hours and at one and one-half this rate for 44 additional hours equals $42.40. Actually, the correlative weekly guarantee was the slightly greater sum of $42.69.

actually paid was regularly consistent with the contractual obligation as stated.

Petitioner sued respondent under § 17 of the Act to enjoin against future adherence to this plan, on the ground that it failed to include overtime compensation as required by § 7 (a). He contended that the actual "regular rate" of compensation payable under these contracts was not the specified basic rate, but rather the quotient of the amount of the correlative guarantee divided by the number of hours worked in that week. This was said to follow from the fact that the employees usually worked less than 84 hours a week and nevertheless received the full guaranteed sum.

The District Court found, however, that the contracts were "bona fide," and that "they were intended to and did really fix the regular rate" at which the men were employed. It denied relief [5] and the Circuit Court of Appeals affirmed,[6] both Courts relying on our decision in the *Belo* case.

Petitioner admits a close similarity of facts and of his basic contentions in this and the *Belo* case. He argues, however, that the *Belo* decision should not be followed: (a) because there are factual differences between the two cases adequate to distinguish them, (b) because *Belo* has been implicitly overruled by later decisions of this Court, and (c) because the *Belo* decision is erroneous.

As to the first of these arguments, we note that the contracts in *Belo* and in this case are substantially identical, except for the amount of the hourly rate and of the fixed guarantee. Under the *Belo* contract, however, overtime would be paid in addition to the guaranteed wage after 54½ hours had been worked in any given week; [7] under

[5] 57 F. Supp. 408.

[6] 152 F. 2d 622.

[7] See the statement and explanation of the *Belo* contract, 316 U. S. at 627–629.

this contract, only after 84 hours. It is said that this 84 hours bears no relation to the usual workweek.

Actually, the employees in this case have no usual workweek. In many weeks they work more than 100 hours; in others less than 30. In about 20 per cent of the workweeks, they work in excess of 84 hours.[8] Whenever they do, they are paid in accordance with the contract on the basis of the specified hourly rate with appropriate overtime.

No more can be said as to the relation between 54½ hours and the usual workweek in *Belo*. It appears from the record in that case that the employees there involved also worked fluctuating workweeks, and that the average workweek was substantially less than 54½ hours. Indeed, it appears that the *Belo* employees exceeded 54½ hours in considerably less than 20 per cent of the weeks worked.[9] When they did so, they too were paid at the contractual rate with appropriate overtime.[10] There is nothing here to suggest different treatment of the two cases.

Petitioner also points to alleged differences in the fact that respondent in this case paid the full weekly guarantee even when its employees worked less than 40 hours in

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[8] The record shows that of 4,284 man-weeks worked by respondent's California field employees between July 5, 1942, and March 11, 1944, about 3% were less than 20 hours in length, about 13% were less than 40 hours, about 67% were from 40 to 84 hours, about 20% were over 84 hours, and about 7% over 104 hours, some running as high as 140 and 150 hours. This "work-week" was the basis for determining compensation, but it did not represent the number of hours actually worked by the employee. In the course of typical cementing and testing operations, many hours counted as working time were spent waiting while the drilling crew was running the casing, the cement was setting, the perforation work was being done by another company, or the testing tool was standing in the well hole.

[9] See Transcript of Record, Supreme Court of the United States, *Walling* v. *A. H. Belo Corp.*, No. 622, O. T. 1941, pp. 194–337.

[10] 316 U. S. at 631–632.

the week, and the fact that respondent carried fixed rather than fluctuating overtime rates on its payroll records.

As to the first of these points, there is actually no difference between this case and *Belo*. The employees in both cases had a contractual right to the full guarantee however short their workweek, and those in *Belo* were paid it as well as those here.[11] The second fact we think without significance. The function of the payroll records was merely to show the amounts of compensation payable. These records did not affect respondent's contract obligations, nor suggest a practice at variance with the contract.

We think that whatever differences exist between this case and *Belo* are without substance, and that it must either be followed or overruled.

This brings us to petitioner's second argument, in which our attention is directed to three cases decided since *Belo*, wherein we held that certain plans of overtime compensation failed to meet the § 7 (a) requirement. It is urged that the provisions for overtime compensation in these cases were legally no less adequate than, and that the principles on which they were decided are necessarily inconsistent with, the overtime provision and the principles of the *Belo* case.

In *Belo* itself, the specified basic hourly rate was held to be the actual regular rate because, as to weeks in which employees worked more than 54½ hours, the specified rate determined the amount of compensation actually payable; as to weeks in which they worked less, the Court inferred from the collateral specification of a basic rate and provision for a legal but variable rate of overtime pay that the guaranteed flat sum then due also contemplated both basic pay and overtime.[12] On the other hand, we

[11] *Fleming* v. *A. H. Belo Corp.*, 121 F. 2d 207, at 210, note 6.

[12] 316 U. S. at 631–632. In *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, decided the same day as *Belo*, the employees also worked

find that in the three later cases relied on by petitioner, the agreed method by which wages were computed made a like inference impossible.

In *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, we considered a "split-day plan," under which a prescribed "regular" hourly rate was payable for the first four hours of each eight-hour shift, and a prescribed "overtime" rate, of one and one-half the "regular" rate, was payable for the other four hours.[13] In those weeks in which an employee worked statutory overtime, he was paid at the contract "overtime" rate for many straight-time hours and at the contract "regular" rate for many overtime hours. Obviously, these prescribed rates were not actual regular and overtime rates, although so named in the plan. Consequently, as in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, we held that the regular rate was to be determined by dividing the wages actually paid by the hours actually worked. In so deciding, we expressly noted that *Belo* was not controlling because the wage plans involved in the two cases posed entirely different questions as to the application of § 7 (a).[14]

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an irregular number of hours each week, but were simply paid a fixed weekly wage. The Court noted the absence of any agreement between the contracting parties for the payment of a specified rate and overtime, and of any contractual limitation on the number of hours the employee could be required to work for the fixed wage. It also noted that these factors were not absent from the *Belo* plan. See 316 U. S. at 581.

[13] Theoretically, when an employee had so accumulated 40 "regular" hours in one week, all subsequent hours were compensable as "overtime." Actually, no employee ever did so. See 323 U. S. at 41.

[14] "Nothing in this Court's decision in *Walling* v. *Belo Corp.*, *supra*, sanctions the use of the split-day plan. The controversy there centered about the question whether the regular rate should be computed from the guaranteed weekly wage or whether it should be identical with the hourly rate set forth in the employment contract. There was no question, as here, pertaining to the applicability of the regular

In *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, and *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, the contracts established two alternative methods for computing each employee's wages. One was to multiply his straight-time hours of work by a specified basic hourly rate, and his overtime hours by one and one-half that rate, and add the products. The other was to multiply the number of jobs done by a specified piecework rate. The employee was entitled to be paid the greater of these two sums.[15] The method of computing the amount due at piece-work rates, which were constant for work done on both straight-time and overtime hours, of course negated any possible inference that the payment of such amount contemplated legal overtime compensation. The specified hourly rates were so low, however, relative to piecework rates, that the latter were always, or almost always, determinative of the wage actually to be paid. These cases held merely that such specified hourly rates were not the "regular" rates of wage payments to which they were not related, and which were computed according to a necessarily inconsistent method. Again, *Belo* was expressly distinguished.[16]

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rate to the first 40 hours actually and regularly worked, with the overtime rate applying to all hours worked in excess thereof." *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, at 42.

[15] In the *Harnischfeger* case, the scheme was actually a little different from that in the *Youngerman-Reynolds* case, which is stated in the text. In *Harnischfeger*, the employee was credited with (a) the product of the total number of hours worked multiplied by the basic rate, plus (b) the amount by which piece-work earnings during all hours worked exceeded the product in (a), plus (c) the product of the number of overtime hours worked multiplied by one-half the basic hourly rate. The difference is that in *Harnischfeger* some provision was made for overtime; but in both cases the provision for overtime was inadequate, and for the same reason. See 325 U. S. at 431–432.

[16] "This Court's decision in *Walling* v. *Belo Corp.*, 316 U. S. 624, lends no support to respondent's position. The particular wage

Indeed, it would seem that the Court's opinions in these cases, far from undermining *Belo*, showed an affirmative concern that language appropriate to the situations then before us should not be extended to the different situation involved in this and the *Belo* case.

Finally, petitioner maintains that *Belo* was wrongly decided and that we should "define the area of [its] continued vitality, if any." His argument on this score is substantially the same as that advanced on behalf of the Administrator and considered by the Court in the *Belo* case itself.

The reasons stated in the *Belo* opinion for rejecting this argument are equally valid today, and need not be repeated. Moreover, our holding in *Belo* has been a rule of decision in this Court for five years, and recognized as such on each appropriate occasion. Knowing of the *Belo* decision, the Congress has permitted § 7 (a) to stand unmodified and the courts have applied it as so construed. Employers and employees (including those involved in this case) have regulated their affairs on the faith of it. Even if we doubted the wisdom of the *Belo* decision as an original proposition, we should not be inclined to depart from it at this time.

Affirmed.

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agreements there involved were upheld because it was felt that in fixing a rate of 67 cents an hour the contracts did in fact set the actual regular rate at which the workers were employed. The case is no authority, however, for the proposition that the regular rate may be fixed by contract at a point completely unrelated to the payments actually and normally received each week by the employees." *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, at 426.

See also the concurring opinion of MR. JUSTICE FRANKFURTER in *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 433. The Court did not expressly refer to *Belo* in its opinion in the *Harnischfeger* case; but, as it did in *Youngerman-Reynolds*, which involves substantially the same question and was decided the same day, we consider that further reference to *Belo* would have been redundant.

SUPREME COURT OF THE UNITED STATES

No. 74.—October Term, 1946.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner, v. Halliburton Oil Well Cementing Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 14, 1947.]

Mr. Justice Rutledge.

I concur in the Court's judgment upon the authority of *Walling* v. *Belo Corp.*, 316 U. S. 624. I agree with Mr. Justice Murphy that the *Belo* decision is inconsistent with later decisions here, in the view it takes concerning the legal effects of the Fair Labor Standards Act. But those cases are distinguishable upon their facts; the *Belo* case has been relied upon by the parties to this cause and no doubt also by others, in making their arrangements; and the facts here seem to me indistinguishable from those covered by the *Belo* decision. Accordingly, although I would restrict the effects of that decision narrowly to the factual situation presented, I join in the judgment now rendered.

SUPREME COURT OF THE UNITED STATES

No. 74.—October Term, 1946.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner, *v.* Halliburton Oil Well Cementing Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 14, 1947.]

Mr. Justice Murphy, with whom Mr. Justice Black concurs, dissenting.

It is conceded that the weekly guaranty was sufficient to pay for 40 hours at the so-called "regular basic rate" and for 44 additional hours at one and one-half times such "basic hourly rate." The contract overtime rate became effective only as to those hours of work in excess of 84. In other words, the "regular basic rate" referred to in the contracts had no meaning or effect whatsoever unless the employee worked more than 84 hours in a week. Whether he worked 20 hours, 40 hours or 60 hours in a week, he was paid the guaranteed amount.

To square such a wage scheme with the plain requirements of § 7 (a) of the Fair Labor Standards Act of 1938 is impossible. Time and again this Court has made it clear that the regular rate of compensation upon which overtime payments are to be based is the hourly rate actually paid to the employee for the normal, non-overtime workweek for which he is employed. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 580; *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 40; *United States* v. *Rosenwasser*, 323 U. S. 360, 363; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 424; *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 430. "The regular

rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts." *Walling* v. *Youngerman-Reynolds Hardwood Co., supra,* 424–425.

Our attention in this case must therefore be focused upon the actual payments, exclusive of those paid for overtime, which the parties have agreed shall be paid during each workweek. And when we do that, we discover that the parties have agreed that the employees shall receive the guaranteed amount, not the so-called "regular basic rate." That guaranteed amount is thus the regular rate for purposes of § 7 (a) of the Act, the so-called "regular basic rate" being an obviously artificial one.

It is said, however, that this scheme is sanctioned by *Walling* v. *Belo Corp.*, 316 U. S. 624. That is true, but it does not justify continuance of the erroneous *Belo* doctrine. The *Belo* case has been distinguished in subsequent opinions of this Court, but the distinctions were essentially ones of fact. On the basis of legal and statutory theory, the *Belo* case is irreconcilable with the later cases. The *Belo* case, which carries its own refutation in its dissenting opinion, should therefore be overruled. Otherwise we shall be perpetuating and augmenting the unrealities and confusion which have marked the application of the doctrine of that case. See Feldman, "Algebra and the Supreme Court," 40 Ill. L. Rev. 489; "Legality of Wage Readjustment Plans under the Overtime Provision of the Fair Labor Standards Act," 13 U. of Chi. L. Rev. 486; 44 Mich. L. Rev. 866.